

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 5, 2005

IN RE:

APPLICATION OF BALSAMWEST FIBERNET, LLC FOR
A CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY TO PROVIDE TELECOMMUNICATIONS
SERVICE PROVIDER TO PROVIDE COMPETITIVE
FACILITIES-BASED AND RESOLD LOCAL EXCHANGE
AND INTEREXCHANGE TELECOMMUNICATIONS
SERVICES THROUGHOUT THE STATE OF TENNESSEE

DOCKET NO.
04-00407

INITIAL ORDER GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority" or "TRA") at a Hearing held on February 10, 2005, to consider the *Application of Balsamwest FiberNET, LLC for a Certificate of Public Convenience and Necessity as a Competing Telecommunications Service Provider to Provide Competitive Facilities-Based and Resold Local Exchange and Interexchange Telecommunications Services Throughout the State of Tennessee* (the "*Application*") filed by BalsamWest FiberNET, LLC ("BalsamWest") on November 19, 2004, for a Certificate of Convenience and Necessity to Provide Competing Local Telecommunications Services within the State of Tennessee ("CCN"). The *Application* requests the Authority to grant a CCN authorizing the provision of competing facilities-based and resold local exchange and interexchange telecommunications services, including exchange access telecommunications services, within the State of Tennessee.

Legal Standard for Granting Certificate of Public Convenience and Necessity

BalsamWest's *Application* was made pursuant to, and was considered in light of, the criteria for granting a CCN as set forth in Tenn. Code Ann. § 65-4-201 (2004), which provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . . .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

* * *

(d) Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to

provide telecommunications services in an area outside its service area existing on June 6, 1995.¹

Furthermore, pursuant to Tenn. Code Ann. § 65-5-112 (2004), a competing telecommunications provider is required to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

The February 10, 2005 Hearing

The Hearing Officer issued notice of the Hearing in this matter on January 31, 2005. No persons sought intervention prior to or during the Hearing. At the Hearing held on February 10, 2005, Ms. Sherry McCuller, the Chief Financial Officer, and Mr. John A. Short, the General Manager for BalsamWest, participated in the Hearing, and were subject to examination by the Hearing Officer. Henry M. Walker, Esq., and Kristy Godsey, Esq., of Boulton, Cummings, Connors & Berry, PLC, 1600 Division Street, Suite 700, Nashville, Tennessee 37203-0025, appeared on behalf of BalsamWest. Upon BalsamWest's conclusion of the presentation of its proof, the Hearing Officer granted BalsamWest's *Application* based upon the following findings of fact and conclusions of law:

¹ Notwithstanding the existence of subsection (d), the Federal Communications Commission ("FCC") has expressly preempted the Authority's enforcement of subsection (d) pursuant to the authority granted to the FCC under 47 U.S.C. § 253(d). *In the Matter of AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated Section 65-4-201(d) (2004) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Area*, FCC 99-100, (Memorandum Opinion and Order) 14 F.C.C.R. 11,064 (May 27, 1999); (Memorandum Opinion and Order) 16 F.C.C.R. 1247 (January 8, 2001). The Authority has since issued an order expanding a competing local exchange carrier's CCN to provide telecommunications services on a statewide basis including areas served by incumbent local exchange carriers with fewer than 100,000 total access lines in Tennessee. See *In re Application of Level 3 Communications, LLC to Expand its CCN to Provide Facilities-Based Local Exchange and Interexchange Telecommunications Services in all Tennessee Service Areas*, Docket No. 02-00230, *Order Approving Application of Level 3 Communications, L.L.C. to Amend Its Certificate of Public Convenience and Necessity* (June 28, 2002).

I. BalsamWest FiberNET's Qualifications

1. BalsamWest is a corporation originally organized under the laws of the State of North Carolina on May 3, 2004, and was qualified to transact business in the State of Tennessee on August 10, 2004.

2. The complete street address of BalsamWest's registered agent is Corporation Service Company, 2908 Poston Avenue, Nashville, Tennessee 37203. The complete street address of BalsamWest's corporate office is 37 College Drive, Sylva, North Carolina 28779. The telephone number is (828) 586-6141 and the facsimile number is (828) 586-3129.

3. The *Application* and supporting documentary information existing in the record indicate that BalsamWest has the requisite technical and managerial ability to provide competitive access services and transport telecommunications services and within the State of Tennessee. Specifically, BalsamWest's senior management team possesses extensive business, technical, operational and regulatory telecommunications experience.

4. BalsamWest has the necessary capital and financial ability to provide the services it proposes to offer.

5. BalsamWest has represented that it will adhere to all applicable policies, rules and orders of the Authority.

II. Proposed Services

BalsamWest intends to provide competing facilities-based and resold local exchange and interexchange telecommunications services, including exchange access telecommunications services, within the State of Tennessee.

III. Permitting Competition to Serve the Public Convenience and Necessity

Upon a review of the *Application* and the record in this matter, the Hearing Officer finds that approval of BalsamWest's *Application* would inure to the benefit of the present

and future public convenience by permitting competition in the telecommunications services markets in the State of Tennessee and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IV. Small and Minority-Owned Telecommunications Business Participation Plan and Business Assistance Program

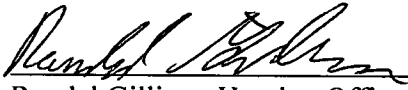
BalsamWest has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-112 (2004) and the Authority's Rules.

V. Compliance with Tennessee's County-Wide Calling Requirements

BalsamWest has indicated its awareness of, and its obligation to comply with, the requirements of county-wide calling as set forth in Tenn. Code Ann. § 65-21-114 (2004).

IT IS THEREFORE ORDERED THAT:

The Application of BalsamWest FiberNET, LLC for a Certificate of Public Convenience and Necessity as a Competing Telecommunications Service Provider to Provide Competitive Facilities-Based and Resold Local Exchange and Interexchange Telecommunications Services throughout the State of Tennessee is approved.


Randal Gilliam, Hearing Officer